United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1147

ORIGINAL

To be argued by
JACK KORSHIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1147

UNITED STATES OF AMERICA,

Appellant,

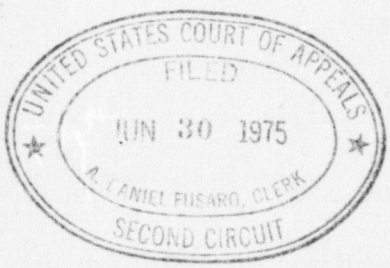
against

ALFRED FAYER,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



JACK KORSHIN
Attorney for Defendant-Appellee
370 East Old Country Road
Mineola, N.Y. 11501
(516) 746-4600

2

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1147

UNITED STATES OF AMERICA,

Appellant,

against

ALFRED FAYER,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

Preliminary Statement

On March 29, 1972, thirteen indictments numbered 72 CR 349 *et seq.*, were filed in the court below. This defendant, Alfred Fayer, was named as a defendant in nine indictments. He was arrested and arraigned on these indictments on March 29, 1972. In these nine indictments he was charged with a count of conspiracy and in one of them, 72 CR 349, he was additionally charged in count 149 with bribery of a government employee, Edward Goodwin, in violation of the U.S.C. title 18, § 201(b)(2).

On May 22, 1972, these indictments were replaced by thirteen superseding indictments numbered 72 CR 587 *et*

seq. Alfred Fayer was dropped as a defendant in all but one of these indictments. He was named as a defendant in only one, 72 CR 589, which charged him with bribery of said Goodwin, this time under subdivision (d) of § 201, title 18. The case had originally been assigned to Judge Travia and, upon his retirement, was assigned to Judge Weinstein. After repeated and unsuccessful attempts before Judge Travia to obtain a trial, on January 24, 1975, almost three years after he had been indicted and arrested, the defendant moved before Judge Weinstein to dismiss the indictment because he had been denied his right to a speedy trial. Judge Weinstein denied the motion.* If the defendant had not been acquitted, he would certainly have appealed to this Court on the ground that the denial of his motion to dismiss for failure to afford a speedy trial was clearly erroneous.

On January 20, 1975, another indictment, No. 75 CR 43, was returned against this defendant, this after a delay of almost three years from the time that the defendant was first indicted and arrested, and despite the fact that all the evidence on which the 1975 indictment was based, and which was later offered in proof of the charge at the trial, had been known to the Government since March, 1972. This indictment charged the defendant with obstruction of justice in violation of 18 U.S.C. § 1503. The indictments having been consolidated for the purposes of trial, and a jury having been waived upon consent of the defendant and the Government, the defendant was finally afforded a trial before Judge Weinstein on February 19, 1975. On February 20, 1975, Judge Weinstein found the defendant

---

* The docket entries for indictment No. 75 CR 43 (A1) state that the motion to dismiss for failure to afford a speedy trial was addressed to that indictment. This is erroneous. The motion was addressed to the 1972 indictment. If that motion had been granted, the defendant would have moved to dismiss the 1975 indictment on the ground that his constitutional rights were prejudiced by unreasonable pre-indictment delay.

not guilty of the bribery charge in indictment 72 CR 589. On February 27, 1975, he found the defendant not guilty of the obstruction of justice charge, indictment 75 CR 43. The Government appealed from the judgments of acquittal on both indictments but has withdrawn its appeal with respect to the bribery charge, 72 CR 589 (see footnote at page 25 of the Government's brief), and prosecutes this appeal only with respect to the obstruction of justice charge, 75 CR 43.

The Facts

In 1971 and 1972 an investigation was in progress into alleged corruption of employees of the Federal Housing Authority by real estate brokers and mortgage lenders. On January 14, 1972, one Edward Goodwin, an F.H.A. appraiser who claimed to have received bribes, had agreed to cooperate with the Government and disclose the wrongdoings to which he was a party (A 189). Some of the targets of the investigation were Eastern Service Corporation and their principals, Rose Bernstein and Harry Bernstein.

Without disclosing to the Bernsteins that he had agreed to cooperate with the Government and without disclosing that he was equipped with a recording device, Goodwin met with the Bernsteins on February 8, 1972. The transcript of the tape recording of that conversation was received in evidence and appears at pages 4 to 75 of the appendix.

On the following morning, February 9, 1972, Rose Bernstein had a conversation with the defendant, Alfred Fayer. The defendant is a member of the Bar and was at that time the attorney for Eastern Service Corporation. Rose Bernstein told Fayer that she had met with Goodwin on the previous day (A 261), that Goodwin had told her that he had been interviewed by two F.B.I. men (A 261), and that Goodwin had told her that he had consulted an at-

torney and had discussed the possibility of cooperating with the Government (A 261). Rose Bernstein also told Fayer that Goodwin was not sure what he wanted to do and that he wanted some advice (A 261). Fayer offered to recommend an attorney for Goodwin (A 261), but Rose Bernstein said that Goodwin "didn't feel that he really needed an attorney" and that "[h]e just wanted some advice" (A 261). The result of this conversation was that an appointment was made for Fayer to join Goodwin and the Bernsteins for dinner that evening (A 262).

Goodwin was again equipped with a recording device. The transcript of the conversation which occurred at this dinner meeting was received in evidence and appears at pages 76 to 174 of the appendix. One of the things which occurred at this meeting was that Fayer told Goodwin that he would recommend an attorney who could competently represent Goodwin. Three days later, on February 12, 1972, Goodwin called Fayer on the telephone. This conversation was also recorded. The transcript of this conversation was received in evidence and appears at pages 175 to 178 of the appendix. In this conversation Fayer informed Goodwin that he had talked to a lawyer (A 175) who might be interested in representing Goodwin but wanted to talk to him (A 176). The attorney whom Fayer recommended was the one who represented him on the trial of this action and who now represents him on this appeal.

The Government's brief is replete with arguments and quotations from the testimony and tape recordings which are designed to demonstrate to this Court that Fayer had criminal intent (Government's brief pages 6-15; 26; 28-30), that on one occasion he lied during his testimony (footnote at page 23 of the Government's brief), that he was guilty of professional misconduct in placing himself in a position of conflict of interest (footnote at page 36 of the Government's brief) and that he was actually guilty

of the bribery charge, but was acquitted of the charge because the judge was "perhaps subconsciously" concerned that to find him guilty "would have a chilling effect on the attorney-client relationship" (footnote at page 25 of the Government's brief). These things will not be dealt with in this brief, not because they cannot be answered, for they can, but because they have no place here. This Court is not concerned with arguments that the evidence warranted factual conclusions which the trial judge did not draw, or different from those which he did draw. The concern of this Court must be only with the factual conclusions drawn by the Court below, the trier of the facts. Those conclusions, as stated by the Court, were:

1. "I have decided that under no view of the law and the facts can I determine beyond a reasonable doubt that the defendant is guilty" (A 356).

2. "There is a reasonable doubt necessarily because I must and do credit the defendant's testimony with respect to what the Bernsteins said to him" (A 356).

3. "As far as Goodwin is concerned * * * he led Mr. Fayer on to believe what the Bernsteins had apparently told him and that is that Goodwin wanted legal views from Fayer with respect to whether he should continue to rely upon this attorney or whether he should get a new attorney" (A 356).

4. The attorney whom the defendant recommended to Goodwin "was a respected member of the bar * * * who I do not believe was subject to manipulation by the Bernsteins or by Mr. Fayer" (A 356-357).

5. "I *do not* find * * * beyond a reasonable doubt" that the defendant "did endeavor to influence Goodwin to take the Fifth Amendment before the grand jury" (A 358) (emphasis supplied).

6. The defendant in his talk with Goodwin "in effect was saying over and over again, 'before you

decide on the Fifth Amendment consult other counsel' " (A 359).

7. One of the defendant's motives in the advice that he gave to Goodwin was to protect the Bernsteins but "I cannot find beyond a reasonable doubt that that was the only motive" (A 360).

8. "Under any definition of 'corruptly' this result [acquittal] would be required" (A 360).

9. A lawyer is not "guilty of crimes because he is in good faith advising a client who's going ahead and continuing to commit other independent crimes" (A 364).

10. "I just don't find beyond a reasonable doubt that this defendant was engaged in a conspiracy with the Bernsteins" (A 364-365).

Based on these findings, the Court determined that the defendant was not guilty. The Court signed a judgment dated February 27, 1975, which states in part that "a verdict having been rendered finding the defendant ALFRED FAYER not guilty, it is ADJUDGED that the defendant ALFRED FAYER is not guilty of the charge in said indictment" (A 369). To prevent any misunderstanding that the meaning and effect of his determination was that he found the defendant not guilty, the judge, in his own handwriting, wrote the following words at the foot of the judgment:

"This order constitutes a judgment of acquittal after trial by the Court."

ARGUMENT

POINT ONE

The judgment is not appealable.

(1)

18 U.S.C. § 3731 says that an appeal by the United States lies from a judgment "*dismissing* an indictment * * *." The statute does not authorize an appeal from a judgment of acquittal and the decisions of the courts interpreting the statute uniformly so hold.

Where a case is tried without a jury, acquittal by the judge has the same legal effect as acquittal by a jury (*United States* v. *Sisson,* 399 U.S. 267, 290 [1970]; *United States* v. *Jenkins,* —— U.S. ——, 95 S.Ct. 1006, 1011 [1975]).

Sisson was decided before the 1971 amendment to § 3731. In that case the Court said (339 U.S. at 270):

> "For reasons that we elaborate in what follows, we conclude that the decision below, depending as it does on facts developed at Sisson's trial, is not an arrest of judgment but instead a directed acquittal. As such, it is not a decision that the Government can appeal."

And at page 299 the Court said that:

> "* * * our holding that the decision below was an acquittal is sufficient to dispose of the case."

The cases hold that the 1971 amendment to § 3731 has not altered the law that no appeal will lie from an acquittal.

In *United States* v. *Lewis,* 492 F.2d 126, 127 (5th Cir. 1974), the Court held:

> "The present law of double jeopardy precludes retrial when the district court has ruled in favor of the de-

> fendant on facts going to the merits of the case if these facts were adduced at an evidentiary hearing."

In *United States* v. *Southern Railway Company,* 485 F.2d 309 (4th Cir. 1973), the Court dismissed an indictment. The Government appealed. The Court held that "the decision of the district court, dismissing counts one through eight of the information against Southern, was in reality a judgment of acquittal taking into account the merits of Southern's defense. Accordingly, we must dismiss the appeal for want of jurisdiction" (485 F.2d at 312).

In *United States* v. *Rothfelder,* 471 F.2d 606 (6th Cir. 1973), the district court granted a pretrial motion to dismiss an indictment which charged the defendant with refusing to report for induction into the armed forces. The Court noted that "[i]n passing upon the motion to dismiss, the Court, 338 F.Supp. 1164, considered the evidence in the Selective Service file, which disclosed [certain] facts" (474 F.2d at 607). The Court said that because the district court had relied on facts not alleged in the indictment but contained in the defendant's selective service file "[i]ts judgment operated as an acquittal" and was not appealable (474 F.2d at 608). In support of this conclusion the Court cited cases decided prior to the 1971 amendment, and then said (474 F.2d at 608):

> "While these cases involve Section 3731 as it was prior to the 1971 Amendment, it is clear that under the Amendment no appeal is available from a judgment of acquittal."

In *United States* v. *Velazquez,* 490 F.2d 29 (2d Cir. 1973), this Court drew a sharp distinction between the right of the Government to appeal in cases in which the trial court has found in favor of a defendant "on facts going to the merits of the case" and those in which the trial court found in favor of defendant on considerations other than the

facts. This Court said in that case (490 F.2d at 34):

> "The present law of double jeopardy precludes retrial in instances when, regardless of the label, the trial court has ruled in favor of the defendant on facts going to the merits of the case if these facts were adduced at trial (United States v. Sisson, *supra*); if they were presented at an evidentiary hearing (United States v. Southern R. Co., 485 F.2d 309, at 312 (4th Cir., 1973)); or if they were stipulated by the parties (United States v. Brewster, 408 U.S. 501, 506, 92 S.Ct. 2531, 33 L.Ed.2d 507 (1972); United States v. Sisson, *supra,* at 285 of 399 U.S., 90 S.Ct. 2117; but see fn. 6, *infra*).
>
> "Retrial is permitted, however, when the trial court ruled in the defendant's favor on the allegations in the indictment (United States v. Brewster, *supra*); on the facts contained in the government's bill of particulars (United States v. Boston & Maine R. Co., 380 U.S. 157, 85 S.Ct. 868, 13 L.Ed.2d 728 (1965)); or on any procedural defect which would manifestly require reversal on appeal if conviction resulted (Illinois v. Somerville, *supra* [410 U.S. 458]). Retrial is permitted in these situations even though the trial itself may have completed its course."

The Government's position in the instant case is that the decision of the Supreme Court in *United States* v. *Jenkins,* —— U.S. ——, 95 S.Ct. 1006, has changed the rule and that an appeal may now be taken from a judgment of acquittal if it is attributable to an erroneous conception of the law. This, it is submitted, is not the import of *Jenkins.*

Jenkins was decided on February 25, 1975, simultaneously with *United States* v. *Wilson,* —— U.S. ——, 95 S.Ct. 1013.

Wilson was tried to a jury, which returned a verdict of guilty. After the verdict, the judge dismissed the indictment on the ground that the defendant's constitutional

rights had been violated by an unreasonable preindictment delay. In *Jenkins* the trial was without a jury. The court "directed that the indictment be dismissed and the [defendant] be discharged" (95 S.Ct. at 1009). The Supreme Court held that the judgment dismissing the indictment in *Wilson* was appealable, but that the judgment in *Jenkins* was not. In *Wilson* the court said (95 S.Ct. at 1026):

> "A system permitting review of all claimed legal errors would have symmetry to recommend it and would avoid the release of some defendants who have benefited from instructions or evidentiary rulings that are unduly favorable to them. But we have rejected this position in the past, and we continue to be of the view that the policies underlying the Double Jeopardy Clause militate against permitting the Government to appeal after a verdict of acquittal. Granting the Government such broad appeal rights would allow the prosecutor to seek to persuade a second trier of fact of the defendant's guilt after having failed with the first; it would permit him to re-examine the weaknesses in his first presentation in order to strengthen it in the second; and it would disserve the defendant's legitimate interest in the finality of a verdict of acquittal. These interests, however, do not apply in the case of a postverdict ruling of law by a trial judge. Correction of an error of law at that stage would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions. We therefore conclude that when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause."

Writing of its decision in *Wilson,* the Court said in *Jenkins* (95 S.Ct. at 1012):

> "We hold today in *Wilson, supra,* that the Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt."

But the Court pointed out that it could not be determined from the record in *Jenkins* what the basis was of the District Court's decision dismissing the indictment, that it could not be determined "that the District Court, in its findings of fact and conclusions of law, expressly or even impliedly found against respondent on all the issues necessary to establish guilt under even the Government's formulation of the applicable law" (95 S.Ct. at 1012).

The Court held that the judgment in *Wilson* was appealable because (as it said in *Jenkins*), where a jury returns a verdict of guilty and a trial court enters a judgment of acquittal "a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict" (98 S.Ct. at 1011). It held that the judgment in *Jenkins* was not appealable because "[t]he court's opinion certainly contains no general finding of guilt, and although the specific findings resolved against the respondent many of the component elements of the offense, there is no finding on the statutory element of 'knowledge'" (95 S.Ct. at 1012). The Court said further (page 1012):

> "On such a record, a determination by the Court of Appeals favorable to the Government on the merits of the retroactivity issue tendered to it by the Government would not justify a reversal with instructions to reinstate the general finding of guilt: *there was no such finding, in form or substance, to reinstate.*" (emphasis supplied.)

Applying to the instant case the principles which governed the Court's decisions in *Wilson* and *Jenkins,* it is

abundantly clear that the Government has no right of appeal. There was not, in this case, a finding or verdict of guilty. To the contrary, the judgment appealed from specifically finds the defendant not guilty. This Court could not, therefore, if it made a determination favorable to the Government, reverse and remand "with instructions to reinstate the general finding of guilt: there was no such finding, in form or substance, to reinstate."

(2)

The crime of which the defendant was accused requires a specific intention to obstruct justice. In *United States* v. *Ryan,* 455 F.2d 728, 734 (9th Cir. 1971), the defendant was charged with violating the same statute as was Fayer, 18 U.S.C. § 1503. The court said:

> "Specific intent to impede the administration of justice is an essential element of the offense. Pettibone v. United States, 148 U.S. 197, 13 S.Ct. 542, 37 L.Ed. 419 (1893).
>
> "The Government states in its brief at page 10: 'Intent is not in issue.' It certainly was in issue, and in our judgment, intent was not established beyond a reasonable doubt."

In *United States* v. *Cioffi,* 493 F.2d 1111, 1119 (2d Cir. 1974), this Court said that in determining guilt or innocence under the obstruction of justice statute:

> "The focus is on the intent or motive of the party charged as an inducer."

In *Cole* v. *United States,* 329 F.2d 437, 442 (9th Cir. 1964), *cert. den.* 377 U.S. 954, a prosecution for violation of the obstruction of justice statute, the Court pointed out that the trial judge had "thoroughly instructed [the jury] on the 'specific intent' necessary to be found in a case such as this."

In the instant case the Government contends that the trial judge made all findings of fact necessary to convict the defendant on the theory that in giving Goodwin the advice that he did, the defendant had a motive to protect the Bernsteins and that this was corrupt. In this contention the Government is in error. Intent is a question of fact and the Government admits, at page 19 of its brief, that whether the defendant endeavored to influence Goodwin "'corruptly'" is one of the "remaining *factual* issues" (emphasis supplied). A verdict of guilty could not have been found by the trial judge in the absence of a finding that Fayer's desire to help the Bernsteins was coupled with the specific intent to obstruct justice as to them by giving advice to Goodwin. The judge made no such finding. Were this Court to reverse, further proceedings would be required of the same nature that impelled the Supreme Court in *Jenkins* to hold that that judgment was not appealable. In *Jenkins* the court said (95 S.Ct. at 1013):

> "Here there was a judgment discharging the defendant, although we cannot say with assurance whether it was, or was not, a resolution of the factual issues against the Government. But it is enough for the purposes of the Double Jeopardy Clause, and therefore for the determination of appealability under 18 U.S.C. § 3731, that further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand. Even if the District Court were to receive no additional evidence, it would still be necessary for it to make supplemental findings. The trial, which could have resulted in a judgment of conviction, has long since terminated in respondent's favor."

The very least that would be required in the instant case, were this Court to reverse, would be a remand to the District Court to make a supplemental finding that Fayer's

motive to protect the Bernsteins was coupled with a specific intent to obstruct justice by giving the advice to Goodwin. This alone, without more, would result in the double jeopardy which precludes the appeal.

POINT TWO

In the absence of proof of a specific intent, the defendant did not act corruptly because of his desire to assist the Bernsteins.

The picture which was presented to the defendant at the meeting with the Bernsteins and Goodwin was that the lawyer whom Goodwin had consulted was a friend, that the consultation was "a very fast, quick consultation without a fee" (A 267) and that the lawyer had advised Goodwin to cooperate with the Government without sitting down "with the United States Attorney and see what kind of a deal he can work out. Work out the best possible deal before he expects his man to speak" (A 269). Fayer was not aware that Goodwin had already agreed to cooperate with the Government (A 270). The advice which Fayer gave, as found by the trial judge, was that before Goodwin decided one way or the other with respect to taking the Fifth Amendment he should " 'consult other counsel' " (A 359). The trial judge found on the facts and on the law that in giving this advice to Goodwin, Fayer had not acted corruptly.* It is difficult to find any sound basis for the Government's contention on this appeal, never advanced in the court below, that a lawyer's giving advice to one who seeks it from him results in acting corruptly, because that advice tends to help another client and, consequently, may possibly impede the Government in its investigation of the other client.

A remarkably similar situation occurred in *McNeal* v. *Hollowell,* 481 F.2d 1145 (5th Cir. 1973). In that case,

---

* Indeed, given the factual setting as Fayer believed it to be, it was very sound, proper advice.

McNeal was on trial in a state court in Mississippi for the murder of a gas station attendant. The prosecutor expected that one Luster would testify that McNeal had admitted shooting the station attendant. In this expectation the prosecutor was disappointed, for Luster testified that it was not McNeal, but McNeal's uncle, who had said that he had killed the attendant. One Banks, who had confessed that he had participated in the gas station holdup, was then called as a witness by the prosecutor, obviously in the expectation that Banks would identify McNeal as a participant in the robbery. At this point McNeal's lawyer, one Ross, obtained permission from the court to speak to Banks and to Banks' lawyer, Kellum, in an anteroom of the court. When Banks, Ross and Kellum returned to the courtroom, Kellum announced that he would not allow Banks to testify. Banks was sworn as a witness and claimed his Fifth Amendment privilege. Being thus unable to make out a case against McNeal, the prosecutor moved for *nolle prosequi,* which motion was granted. McNeal was re-indicted, re-tried and found guilty. After exhausting his state post-conviction remedies, McNeal filed a federal habeas corpus petition against Hollowell, the superintendent of the penitentiary where he was confined, claiming that his second trial violated the constitutional prohibition against double jeopardy. A hearing was held in the District Court. The state of Mississippi contended that Ross' conduct in convincing Banks' attorney to have his client plead the Fifth Amendment was tantamount to secreting him to make him unavailable as a witness, that the *nolle prosequi* was in effect a mistrial and that since the defendant had caused the mistrial, he could not complain that double jeopardy barred his retrial. The District Court dismissed the writ, but the Court of Appeals reversed and said (481 F.2d at 1152):

> "We start from the premise that an individual may not bribe, coerce, force, or threaten a witness to claim the privilege against self-incrimination. *See* 18 U.S. C.A. § 1503; Cole v. United States, 9 Cir. 1964, 329

F.2d 437, cert. denied, 377 U.S. 954, 84 S.Ct. 1630, 12 L.Ed.2d 497. *See also* United States v. Herron, N.D. Cal.1928, 28 F.2d 122. None of these forms of conduct has been even tangentially attributed to Ross, McNeal's counsel. Instead, in the course of preparing for the trial of his client, Ross contacted the key witness Banks and his attorney Kellum, apparently impressed on Kellum the danger of Banks' testifying while still under indictment for the same offense, and reminded him of the protection afforded by the Fifth Amendment. This conduct was wholly different than the secretion of a witness suggested by the State and we perceive no impropriety in it.

"According to the prosecutor's later testimony, this meeting with Banks at the trial was the first opportunity Ross had had to discuss the case with him. Additionally, it is not suggested that Ross prevailed directly on Banks at this time. Rather it is agreed that at all times Banks' counsel Kellum was exercising his own discretion and that he personally made the final decision to have Banks plead the Fifth Amendment.

"On these facts, Ross' conduct was no more than the legitimate action of a defense counsel who was contacting an important witness—a co-indictee—and his counsel to discuss a matter of mutual importance to them. While we need not go so far as to say that it was Ross' duty to do this, we have no doubt that he was entitled to do it and that to do so he need not relinquish any of his client's rights—here the valued right to have his trial concluded before the first jury."*

Fayer's dealings with Goodwin are strikingly similar to the dealings of McNeal's lawyer with Banks. Manifestly,

* There is not a word in the Court's opinion criticizing McNeal's lawyer for his conduct even though it was stated in the dissenting opinion that Banks was not merely "'advised'" but was "*importuned, persuaded,* and *prevailed upon* to stay off" the stand (481 F.2d at 1155) (emphasis by the Court).

if there were to be indictments, Goodwin would have been a co-defendant with the Bernsteins. As in *McNeal,* Fayer was discussing with Goodwin "a matter of mutual importance" to Goodwin and the Bernsteins. As in *McNeal,* Fayer did not advise Goodwin to take the Fifth Amendment, but advised him only to obtain adequate counsel and to follow his advice as to whether or not to take the Fifth Amendment.

At pages 30 to 32 of its brief, the Government contends that Fayer should have been acquitted only if his intention was to give legal advice to Goodwin and not in any way to protect the Bernsteins. The cases cited by the Government in support of this contention are inapposite. In the treason case cited by the Government, *Haupt* v. *United States,* 330 U.S. 631, the defendant claimed that he had given aid to his son, who had committed treason, out of parental solicitude, rather than with intent to injure the United States. Similar situations existed in the other treason cases cited by the Government at page 31 of its brief. In those cases, the question of fact of the intent of the defendants was submitted to the triers of the facts, who found that the intent had been treasonable. In the instant case, the trier of the facts did not find that when Fayer gave advice to Goodwin he had the intent to obstruct justice.

In *Anderson* v. *United States,* 417 U.S. 211, cited at page 32 of the Government's brief, the defendants claimed that they could not be convicted of a conspiracy to injure citizens in the free exercise of their right to vote (18 U.S.C. § 241) because the primary purpose of the conspiracy was not to affect a Federal election, but a state election. The Court rejected this argument because the defendants' conspiracy to rig the results of a state election was a corrupt, criminal act from the very beginning, so that it made no difference that the purpose of the conspiracy was directed towards a state, rather than a federal, election. In *Ingram* v. *United States,* 360 U.S. 672, cited at page 32 of the

Government's brief, the defendants were engaged in Georgia in the operation of a lottery, a crime in Georgia. They were convicted of conspiracy to evade the payment of the federal tax on gambling. The question before the Court was not, as claimed by the Government at page 32 of its brief, whether "a person is criminally liable for violating provisions of a federal law even if the violation of that law was only a 'secondary' or 'minor' purpose of the conspiracy," but whether the convictions of two of the defendants could stand in the absence of proof of "*at least* the degree of criminal intent necessary for the substantive offense itself" (360 U.S. at 678) (emphasis by the Court). Finding that this criminal intent had not been factually established by the prosecution, the Court reversed the convictions of the two defendants.

An obvious difference between *Anderson* and the instant case is that in *Anderson* the Court found that a criminal intent pervaded the defendants' conduct, even though that criminal intent may not have been to violate the federal statute, while in the instant case the Court refused to find that Fayer had a criminal intent in advising Goodwin and did not find that in giving advice to Goodwin he had a criminal intent to obstruct justice as to the Bernsteins. An obvious similarity between *Ingram* and the instant case is that in *Ingram*, the convictions of two defendants were reversed because the criminal intent had not been proved and in the instant case the criminal intent necessary to convict was not factually established.

CONCLUSION

This appeal should be dismissed for lack of jurisdiction. If the appeal is not dismissed, the judgment of acquittal should be affirmed.

Dated, June 27, 1975.

Respectfully submitted,

JACK KORSHIN,
Attorney for Defendant-Appellee.

Services of three (3) copies of

the within

hereby admitted this day

of , 197

Attorney for